

1 JOSEPH P. RUSSONIELLO (CASBN 44332)  
2 United States Attorney

3 BRIAN J. STRETCH (CASBN 163973)  
4 Chief, Criminal Division

5 JOSEPH A. FAZIOLI (ILSBN 6273413)  
6 Assistant United States Attorney

7 150 Almaden Boulevard, Suite 900  
8 San Jose, California 95113  
9 Telephone: (408) 535-5061  
10 Facsimile: (408) 535-5081  
11 E-Mail: joseph.fazioli@usdoj.gov

12 Attorneys for the United States

13  
14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN JOSE DIVISION

17  
18 UNITED STATES OF AMERICA, ) No. CR 07-00622 JF  
19 Plaintiff, ) UNITED STATES' SENTENCING  
v. ) MEMORANDUM  
20 MARK FIRST, ) SENTENCING DATE:  
21 Defendant. ) July 17, 2008

22 The United States of America hereby submits its sentencing memorandum in the above-  
23 captioned case. On March 26, 2008, the defendant pled guilty pursuant to a plea agreement to an  
24 information charging him with single count of Possession of Matters Containing Any Visual  
25 Depiction of a Minor Engaging in Sexually Explicit Conduct, in violation of 18 U.S.C. §  
26 2252(a)(4)(B). There is a disagreement between the parties and the Probation Department  
27 regarding the correct calculation of the defendant's sentencing guidelines. The Probation  
28 Department's calculation of the Guidelines includes a two-level enhancement for possession of a  
single image of child pornography alleging involving a pre-pubescent minor, resulting in an  
adjusted total offense level of 24 and criminal history category I. The sentencing range for

1 imprisonment is 51 to 63 months. The Probation Department recommends that the Court impose  
2 a prison term of 57 months along with other enumerated conditions including a 60 month term of  
3 supervised release.

4 The United States has reviewed the final pre-sentence report (PSR) and has no objection  
5 to the factual information contained therein. The plea agreement's calculation of the Guidelines  
6 results in an adjusted offense level of 22. Since the defendant is subject to a criminal history  
7 category I, his Guidelines sentencing range for imprisonment under the plea agreement is 41 to  
8 51 months. The defendant has recommended that he receive a non-custodial probationary  
9 sentence. The United States respectfully recommends that this Court impose a mid-range 46  
10 month sentence of imprisonment for the defendant's conduct along with the other enumerated  
11 conditions recommended by the Probation Department.

12 **DISCUSSION**

13 **A. A Mid-Range, 46 Month Sentence of Imprisonment for the Defendant is Reasonable  
14 and Appropriate**

15 Defendant's criminal conduct merits a significant prison term. Under the circumstances  
16 of this case, a mid-range Guidelines sentence of 46 months would appear to be an appropriate  
17 disposition. Specifically, defendant possessed child pornography and also subscribed to websites  
18 containing child pornography. As the Probation Department notes in its Sentencing  
19 Recommendation: “[t]he defendant used his personal computer to download 340 images and 80  
20 videos that contained child pornography. The defendant obtained these images from various  
21 child pornography websites to which he subscribed at a cost of \$45 to \$50 a month. It is  
22 particularly egregious that the defendant paid subscription fees to child pornography websites, as  
23 this gives him additional culpability for perpetuating and rewarding an industry which benefits  
24 from the victimization of children.” PSR Sentencing Recommendation at 2.

25 A mid-range sentence of 46 months would comply with the purposes set forth in 18  
26 U.S.C. § 3553(a)(2), as required by 18 U.S.C. § 3553(a). First, a 46 month sentence would  
27 reflect the seriousness of the defendant's offense, possessing child pornography, and provide  
28 adequate punishment for this offense. 18 U.S.C. § 3553(a)(2)(A). Second, a 46 month sentence

would serve afford adequate deterrence of further criminal conduct—both for the defendant and the public, as 18 U.S.C. § 3553(a)(2)(B) requires. Furthermore, a 46 month sentence would serve to protect the public from further criminal conduct by the defendant. 18 U.S.C. § 3553(a)(2)(C). Given the aforementioned factors, a substantial term of imprisonment is a reasonable and appropriate sanction for the defendant’s conduct.<sup>1</sup>

## **CONCLUSION**

For the foregoing reasons, the United States respectfully requests that the Court sentence the defendant to 46 months imprisonment along with imposing the other terms and conditions enumerated by the Probation Department.

JOSEPH P. RUSSONIELLO  
United States Attorney

JOSEPH A. FAZIOLI  
Assistant U.S. Attorney

<sup>1</sup> The Government also recommends that, pursuant to the plea agreement in this case, the defendant be required to forfeit his interest in the Hewlett Packard Pavilion Computer, serial no. GFDP13420236A, upon which he possessed child pornography.